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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

J. PAUL FORD, WARDEN,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

How does a reviewing court determine whether a state trial judge "improperly required" joint representation by counsel of multiple defendants over objection at trial so that a defendant's Sixth Amendment right to the assistance of counsel was violated?

II.

Should this Court apply the actual conflict/adverse impact test for assessing conflicts of interest in joint representation cases to determine whether a Sixth Amendment violation occurred?

III.

May a federal habeas corpus court, when conditionally granting relief, commence the running of any retrial period afforded the state from the date the opinion is issued, – i.e., before the case is final and the mandate has issued?

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J. PAUL FORD, WARDEN,

Petitioner,

v.

HENRY HAMILTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Warden J. Paul Ford, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on August 21, 1992, and the denial of the request for rehearing on October 21, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 969 F.2d 1006, and is reprinted in the Appendix hereto, App. 1, *infra.*

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on August 21, 1992, and the request for rehearing denied on October 21, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

Respondent Henry Hamilton was jointly indicted with Michael Fortson on July 12, 1983, by the Fulton County, Georgia, grand jury for the May 28, 1983, malice murder of Stephen L. Hynes and two counts of criminal attempt to commit armed robbery upon Mr. Hynes and Catherine Moore. At a joint jury trial beginning November 14, 1983, where Respondent and his codefendant were represented by the same counsel, both defendants were found guilty of felony murder. Both defendants received sentences of life imprisonment.

Although represented by new, separate counsel, Respondent and his co-defendant filed a joint appeal to

the Supreme Court of Georgia, asserting among other issues that their trial counsel labored under an actual conflict of interest. The Supreme Court of Georgia applied the actual conflict/adverse impact test to the conflict claim and found this, as well as the other issues, lacked merit and affirmed the convictions and sentences of both defendants. *Hamilton v. State*, 255 Ga. 468, 339 S.E.2d 707 (1986).

Through direct appeal counsel, on March 13, 1989, Respondent filed a petition for a writ of habeas corpus in the United States District Court, Northern District of Georgia, Atlanta Division. Respondent raised issues exhausted in his direct appeal. An answer, brief and exhibits from the trial and direct appeal proceedings were submitted by Petitioner Ford (hereinafter the Warden).

On August 24, 1989, the magistrate judge entered his report and recommendation, denying Respondent's motion for a federal evidentiary hearing and recommending that relief be denied. In denying relief on the conflict of interest claim, the court applied the actual conflict/adverse impact test to find it lacked merit. Respondent filed objections through counsel.

On November 15, 1989, the district court adopted the report and recommendation. Judgment was entered in favor of the Warden on that same date.

On December 26, 1989, counsel for Respondent filed a motion for certificate of probable cause, an application for certificate of appeal to proceed in forma pauperis, a motion to proceed in forma pauperis, and a motion for appointment of counsel. On January 11, 1990, the district

court granted a certificate of probable cause and pauper's status but denied the motion for appointment of counsel.

On February 5, 1990, the district court clerk entered on the docket a notice of appeal in Respondent's case. The clerk made an entry that the clerk had treated the case as though a notice of appeal had been filed.

On April 2, 1990, the United States Court of Appeals for the Eleventh Circuit denied Respondent's motion for appointment of counsel. On April 3, 1990, Respondent's appeal was consolidated with the appeal of his co-defendant whose case had proceeded jointly through the federal district court on a habeas corpus petition raising the same conflict issue as in Respondent's case. *Fortson v. Burden*, No. 90-8022 (11th Cir. appeal dismissed July 13, 1990). The co-defendant's appeal was dismissed for want of prosecution.

Following the initial submission of briefs on behalf of the parties, the Eleventh Circuit appointed counsel to represent Respondent. Supplemental briefs were filed. Oral argument was had before a panel of the court on June 25, 1992.

On August 21, 1992, the panel issued its opinion, finding that, because Respondent had raised a timely objection at trial to joint representation and the trial court did not conduct "adequate inquiry" into the potential conflict of interest, reversal was automatic. (App. 1-16). The panel directed that the writ of habeas corpus issue within 90 days from the date of the opinion unless the state had commenced retrial proceedings. (App. 16).

The Warden's timely petition for rehearing and/or suggestion of rehearing en banc was denied on October 21, 1992. (App. 17-18). The Warden also filed a motion to stay the running of the retrial period, but the court did not rule upon that motion. However, on December 10, 1992, the court granted the Warden's motion to stay issuance of the mandate up to and including January 20, 1993.

With regard to the underlying offenses, the Warden adopts the statement of facts set forth by the Georgia Supreme Court in its direct appeal opinion. (App. 2, n.1).

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO FORMULATE A TEST FOR DETERMINING WHETHER JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED" OVER OBJECTION.

This Court has never promulgated a test for determining when a trial court "improperly requires joint representation over timely objection" to warrant automatic reversal. *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978). The Warden urges this Court to grant certiorari to formulate just such a test for reviewing the actions of trial judges.

The need for such a test is readily evidenced by this case as the trial court did not ignore the assertions of conflict but ascertained that the lawyer would not be representing competing interests as the defendants planned to offer separate alibi defenses. Yet, the panel below concluded the trial court's inquiry was inadequate

through substituting its own credibility findings for those of the trial judge, who had been in the best position to assess the demeanor of trial counsel, and also misstating facts.

Here, Respondent never raised any objection to joint representation until the morning of his November 14, 1983, trial. Counsel for the defendants, who had been representing both of them since July, announced "not ready" when the case was called because the defense had "a number of motions," including one for a continuance. (Trial Record, p. 8; Trial Transcript, p. 3) (the latter hereinafter designated T.) Counsel then asserted that the "defendants should have separate counsel" since the motion for severance had been denied previously and that if they were tried together, counsel could not "adequately defend one without, in the eyes of the jury, seemingly to, at least by default, admit the guilt of the other." (T. 9). Counsel reasserted the previously denied motion for severance or alternatively requested separate counsel. *Id.* The trial court asked counsel for his reasons, and counsel stated he did not "want to be specific." *Id.* The trial court replied, "That's what I thought." *Id.* The court further noted that it had spent the preceding weekend reading "almost every word that was in this box which was the state's file, at your request" as part of the in camera inspection; based upon that information the trial court did not "see any reason why these defendants shouldn't be tried together based upon what I have read in the state's file." (T. 9-10). The court and defense counsel discussed the possibility of a public defender being appointed, but defense counsel stated another lawyer could not possibly be ready to go forward. (T. 10-11).

The prosecutor noted that at a prior pre-trial hearing (which was never transcribed or made part of the record on direct appeal), the prosecutor had sua sponte raised the joint representation issue and the defendants had understood the ramifications of and elected to proceed with joint representation. (T. 11). Defense counsel did not contradict these assertions. *Id.* However, defense counsel asserted that information he had gleaned over the week-end warranted separate counsel on the basis that "the defense of one will necessarily seem in the minds of the jury to be giving up on the other man's innocence and I certainly don't concede that." (T. 13). The trial court ascertained that the defense planned to present separate alibi defenses. (T. 13-14). The court further noted that there had been "a program since July" that whenever it seemed the court had ruled on all pending motions, the defense filed new ones the next day, noting in particular the dilatory nature of a motion filed on November 9th requesting transcription of an October 17th pretrial motions hearing. (T. 16).

Discussions then centered on whether the court's in camera inspection of the state's file had yielded any exculpatory matters (T. 18-52), during which the defense again requested a continuance (T. 39). When counsel again requested a continuance to interview witnesses, the trial court noted counsel had been in the case since July, the court had been lenient in postponing arraignments and allowing additional time for motions, counsel was "still arguing the same thing," and the court "firmly believe[d]" that counsel was aware of the evidence the state would introduce as similar transactions and who generally would be called as witnesses. (T. 58-59). When

these and other motions failed, counsel again requested separate counsel and again renewed the continuance request. (T. 61-62). Thus, while there was only an explicit ruling denying these last two motions (T. 62), it is clear from the tenor of the entire colloquy on defense counsel's motions that the trial court viewed them as a stalling tactic.

The panel relied upon selected portions of the colloquy on all defense motions to view the trial court as curtailing inquiry into the assertions of conflict. The court misstated the record or misconstrued its significance. For example, the panel treated the in camera inspection as a mere perusal of the "trial file" and ignored the fact the trial court was discharging its duty to uncover exculpatory evidence in the state's file the defense requested under *Brady v. Maryland*, 373 U.S. 83 (1963). (App. 14-15). The panel also found, for example, that the defense allegedly renewed the conflict motion after Calvin Fletcher testified that, while visiting co-defendant Fortson's niece, Fortson told Fletcher Respondent shot the victim. (App. 14, n.5). The record shows no such request. (T. 768).

Most significantly, the panel assumed Fletcher's testimony was not objected to because of the alleged conflict and the testimony was otherwise inadmissible against Respondent. (App. 15, n. 6). This is erroneous because, under Georgia's conspiracy statute which permits declarations of co-conspirators made during the concealment phase of the crime to be admitted, this statement would have been admitted against Respondent even if he had had separate counsel to object or a separate trial had been ordered. *See* O.C.G.A. § 24-3-5. This is not the same scenario as *Glasser v. United States*, 315 U.S. 60, 74-75

(1942), where the lack of objection resulted in the questionable admission of a co-conspirator's testimony.

Thus, without a test for determining whether joint representation was "improperly required" by a state trial court, a reviewing court is free to rule that a trial court's actions were inadequate, even where the record reveals no reasonable basis upon which to "presume that the possibility for conflict has resulted in ineffective assistance of counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). It is state trial courts who are most vulnerable to being "whip-sawed" by *Holloway* as federal courts now have the benefit of Federal Rule of Criminal Procedure 44(c) for guidance in multiple representation situations. *Wheat v. United States*, 486 U.S. 153, 160-61 (1988). Even where a trial court's inquiry reveals that counsel is not simultaneously representing competing interests and the assertions of conflict appear pro forma or dilatory, given *Holloway's* rule of automatic reversal but lack of guidance in its application, a cautious trial judge would be afraid not to yield. For these reasons, the Warden urges this Court to grant certiorari on this question.

II. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE ACTUAL CONFLICT/ADVERSE IMPACT TEST SHOULD BE APPLIED TO DETERMINE IF JOINT REPRESENTATION WAS "IMPROPERLY REQUIRED."

The Warden urges this Court to grant certiorari to hold that, in light of *Cuyler v. Sullivan* there should no longer be a different test for assessing potential conflict of interest claims raised by defendants who do object at trial

to joint representation and those who do not. The panel in this case held that the *Cuyler* actual conflict/adverse impact test is limited to cases where no objection was raised by the defendants at trial to joint representation. Instead, the panel relied upon *Holloway v. Arkansas* to conclude that the trial judge in this case, when confronted on the morning of trial with assertions of conflict in addition to other dilatory motions, did not make "sufficient" inquiry into the conflict and found that reversal was automatic.

In *Holloway v. Arkansas,* this Court held that joint representation is not per se violative of the Constitution. 435 U.S. at 482. Nevertheless, this Court found that the trial judge, who was faced with repeated objections, motions and assertions of conflict of interest by trial counsel who jointly represented three co-defendants, "failed either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." *Id.* at 484.

Holloway's rule of automatic reversal apparently stems from the "assumption" that *Glasser v. United States,* 315 U.S. 60 (1942), "requires reversal, even in the absence of a showing of specific prejudice to the complaining codefendant, whenever a trial court *improperly permits or requires* joint representation." *Holloway,* 435 U.S. at 487. (Emphasis supplied).

In *Cuyler v. Sullivan,* this Court addressed two issues left open by *Holloway,* these being whether a state trial judge must inquire sua sponte into joint representation and whether the "mere possibility" of a conflict of interest is sufficient to result in a Sixth Amendment violation

of the right to counsel. 446 U.S. at 345. This Court construed *Holloway* as requiring "state trial courts to investigate timely objections to multiple representation," 446 U.S. at 346, but declined to read *Holloway* as placing a duty upon trial courts to initiate inquiry into joint representation. This Court also formulated, apparently for the first time, a test for determining what constitutes a conflict of interest:

> In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.

Cuyler, 446 U.S. at 348.

Subsequently, in *Strickland v. Washington,* 466 U.S. 668, 692 (1984), this Court discussed situations in which prejudice would be presumed when counsel was actually or constructively denied the defendant and noted that conflict of interest cases warrant a "similar, though more limited presumption of prejudice." In a conflict situation, "prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Strickland,* 466 U.S. at 692, *quoting Cuyler,* 446 U.S. at 348. *Strickland* made no reference to whether *Cuyler's* actual conflict/adverse impact was triggered by a lack of objection at trial.

Similarly, *Burger v. Kemp,* 483 U.S. 776, 783 (1987), applied the *Cuyler* test in a death penalty trial without reference to whether the defendant had objected at trial. In *Burger* itself, there was no joint trial of defendants;

instead, the claim was that two law partners appointed to represent the two co-defendants at separate trials constituted joint representation.

At the time *Holloway* was decided, this Court had not promulgated a test for resolving conflict of interest claims. Indeed, in *Holloway*, this Court never determined whether an actual conflict of interest was present but "simply held that the trial court's error unconstitutionally endangered the right to counsel." *Cuyler*, 446 U.S. at 345. This Court had also not yet identified the parameters of when prejudice would be presumed under the Sixth Amendment, as subsequently made clear in *Strickland v. Washington*. However, given these subsequent Sixth Amendment developments, it is no longer clear whether *Cuyler* applies solely to "no objection" cases or whether its "no objection" language is merely dicta.

Given the fact that this Court now has a conflict of interest test and trial courts are aware of *Holloway's* directive to inquire into assertions of conflict, there no longer seems a reason to distinguish between potential conflict of interest claims raised by defendants who timely object and those who do not. This Court is still examining whether there was an impermissible infringement of the right to the assistance of counsel. That a defendant timely objects may be weighty proof of a possible conflict, but it should not be dispositive of the issue. A trial court must still determine if counsel may be simultaneously representing competing interests. For these reasons, the Warden would urge this Court to grant certiorari to resolve this unanswered question.

III. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT A FEDERAL HABEAS CORPUS COURT, WHEN GRANTING RELIEF, SHOULD COMMENCE THE RUNNING OF ANY RETRIAL PERIOD WITH THE ISSUANCE OF THE MANDATE.

Finally, in granting habeas corpus relief, the panel ordered that the "writ shall issue unless, *within 90 days from the date of this opinion,* the state has commenced proceedings to retry the [Respondent]." (App. 16). (Emphasis added). Such a provision appears to be an attempt to thwart "the state" through its representative from seeking further review of the decision to grant relief. Such a provision places the state in a "catch-22" in that, if the state begins the retrial, attempts for review of the decision to grant relief may be viewed as moot. Yet, if such a provision is permitted to stand, the state risks litigation on its ability to retry the defendant at all.

The Warden notes that in *Lockhart v. Fretwell,* No. 91-1393 (U.S., argued Nov. 3, 1992), this Court is examining the scope of what remedies may be ordered by a federal habeas court in granting relief. In that case, the district court had granted relief and ordered the state to conduct a resentencing trial within 90 days or a life sentence would be imposed, and the state was forced to seek a temporary stay of this order. *Fretwell v. Lockhart,* 946 F.2d 571, 573 (8th Cir. 1991).

It has been customary for federal habeas corpus courts to delay the petitioner's release, if relief were granted, to allow the state time to correct any defect on its custody. *Mahler v. Eby,* 264 U.S. 32 (1924). However, this practice should not be used as a tool to discourage

the state from seeking further review of a decision with which it disagrees. Given the procedures governing the issuance of the mandate, the Warden urges this Court to grant certiorari in light of *Fretwell* to hold that any retrial period should commence when the decision granting relief is final and the mandate issues.

CONCLUSION

WHEREFORE, for all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals as the decision presents questions of paramount importance not previously decided by this Court.

Respectfully submitted,

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HAMILTON v. FORD

Henry HAMILTON, Petitoner-Appellant,

v.

Paul FORD, Warden, Jack T. Rutledge Correctional Institute, Respondent-Appellee

No. 90-8023.

United States Court of Appeals,
Eleventh Circuit.

Aug. 21, 1992.

Before BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

BOWNES, Senior Circuit Judge.

This is an appeal from a denial of a writ of habeas corpus from the United States District Court for the Northern District of Georgia. Petitioner Henry Hamilton claims ineffective assistance of counsel as well various trial errors. Because we find that petitioner received ineffective assistance of counsel, we conditionally grant petitioner's writ.

Background

Hamilton was arrested and subsequently indicted in Georgia state court for the murder of Stephen Hynes,

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

which occurred on May 28, 1983. Hynes was murdered during an attempted robbery.[1] The indictment charged petitioner and co-defendant Michael Fortson with one count of malice murder and two counts of attempted

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[1] The Supreme Court of Georgia on direct review of Hamilton's appeal found the following facts:

> On the evening of May 28, 1983, the victim and his fiancee, Catherine Moore, were preparing to have dinner on the sidewalk outside her apartment door which she used as a patio, the couple having been talking and drinking beer and champagne there for about 45 minutes. Catherine testified that, when she heard a "soft creeping sound," she turned to see a male crouching down with a silver revolver, who stated, "Don't look at me; don't look at me." He then said, "You can come on down, buddy," whereupon a second male emerged from the bushes in a few seconds. Stephen and Catherine stood up when the armed intruder gave instructions that "we are going to enter the apartment now." Stephen held Catherine's arm, and they ran for about 10 yards, at which time two or three gunshots were fired, and they both fell. Catherine testified that she got up and, when she looked back, saw the assailant shoot her fiance who was facing him.
>
> There was evidence that appellant Fortson sustained gunshot injuries to his leg, which he explained to a witness as having happened accidentally while appellant Hamilton was shooting victim Hynes. Expert testimony confirmed other evidence that the victim was killed by a .38 caliber bullet entering the chest from the rear. Another bullet recovered from the victim's body was also a .38 caliber, but had been fired from a different revolver. Identification of the appellants as the assailants was made by Miss Moore from a police lineup, as well as from a hat and samples of hair, blood and saliva from the crime scene.

Hamilton v. State, 255 Ga. 468, 468-69, 339 S.E.2d 707 (1986).

robbery of Hynes and his fiance [sic], Catherine Moore. The indictment listed twenty-three witnesses.

Both Hamilton and Fortson, Hamilton's cousin, were represented during pretrial motions by one attorney. On September 13, 1983, counsel moved to sever the trials of the two co-defendants. Defense counsel also filed several motions to obtain the evidence against his clients. These motions included a request for a copy of the indictment, a request for a list of witnesses, a request to compel discovery, and a request for a commitment hearing.

During a pretrial hearing on October 17, 1983, the court denied defendants' motion for severance. It also ordered the prosecution to provide the defense with a list of witnesses and their addresses, setting a deadline of October 28. Finally, the court set a date of November 14 as the first day of trial. In a letter dated October 21, the prosecutor produced a list of 144 potential witnesses with incomplete addresses. The weekend prior to trial, the prosecution provided the defense with a list of a witnesses who would actually testify at trial.

On November 14, 1983, the first day of trial, defense counsel renewed his request for severance, or in the alternative, appointment of separate counsel to represent one of the defendants. Counsel explained that investigation over the preceding weekend had led him to believe that he could not effectively represent both defendants because they had conflicting interests. The prosecutor objected, noting that in a previous pretrial hearing the defendants had indicated that they understood the ramifications of joint representation.

Defendants' counsel replied that when defendants allegedly consented to joint representation three moths prior to trial, it was unclear what the ramifications of joint representation would be. He observed that new information had been discovered up to and including the weekend prior to trial. He further added that he believed that it would be a miscarriage of justice for the men to be jointly represented. The court asked counsel whether the defense would consist of placing defendants in different places at the same time. Counsel answered in the affirmative. The court then commented that "it gets kind of complicated for a trial judge when he is charged with the efficiency of his office as well as the sanctity of his office." Counsel then repeated that the motion for separate counsel was not intended as a delaying tactic. The court denied the motion of severance and for separate counsel and the case went to trial.

The bulk of the evidence at trial consisted of Moore's testimony and that of several victims of "similar transactions" – involving armed robberies. Moore was able to identify both Hamilton and Fortson as being involved in the murder of Hynes, although she did not testify as to whether both or only one actually shot her fiance. The various victims of "similar transactions," with varying degrees of certainty, identified one or both of the defendants as having robbed them. Though the trial court termed these robberies "similar transactions," the testimony indicated that in some of the robberies only one individual was involved.

The prosecution also placed into the evidence the testimony of Calvin Fletcher, Gwendolyn Cates, and James Tate. Fletcher testified that at a party defendant

Fortson told him that Hamilton had shot Hynes and in the process had accidentally shot him as well. No objection was made during the testimony. Cates testified that she was at the same party and saw Michael's injured leg. She also attempted to testify to the effect that Yolanda Cudger, Fortson's niece, had stated that Fortson was injured as a result of the Hynes killing. Defense counsel objected on grounds of hearsay and the objection was sustained. Finally, Tate also testified as being present at the party and observing Fortson's injury. He, too, testified that Cudger had explained that Fortson's injury had been the result of the attempted robbery of Hynes.

After the testimony of Fletcher, Cates, and Tate, defendants' counsel renewed his motion for separate counsel. He explained that to represent Hamilton properly, he needed to cross-examine Fortson about the testimony of the three witnesses but could not properly do so because Fortson was his client as well. The court again denied the motion after the prosecutor asserted that defendants had waived their right to conflict-free representation. The court did require, however, that counsel from the public defender's office sit in on the case and advise the defendants in the event that independent cross-examination was necessary.

Defendants' theory of the case mainly consisted of alibi testimony. Both defendants testified on their own behalf. Fortson denied stating that he had received his leg wounds during the attempted robbery as testified by Fletcher. He explained that he had received them in a disagreement over a craps game the night before the robbery. Fortson testified that he was at his girlfriend's home the night of the robbery. Hamilton also denied

involvement in the murder and stated that he was at his girlfriend's home at the time of the murder.

Both Hamilton and Fortson were convicted of felony murder and armed robbery and sentenced to life imprisonment on November 28, 1983. The Georgia Supreme Court affirmed their convictions on appeal. Finding no actual conflict of interest, the court held that both defendants received effective assistance of counsel. It also held that such a claim "may not be raised for the first time on direct appeal." *Hamilton v. State*, 255 Ga. 468, 470, 339 S.E.2d 707 (1986).

On March 13, 1989, Hamilton filed a writ of habeas corpus in the District Court for the Northern District of Georgia pursuant to 28 U.S.C. § 2254. In his report and recommendation, the magistrate found that Hamilton had received effective assistance of counsel because he failed to demonstrate specific instances in the record where a conflict had occurred or where he had been prejudiced by that conflict. The district court adopted the report and recommendation on November 27, 1989, and denied the petition.

On December 26, 1989, Hamilton filed an application for a certificate of probable cause to appeal the denial of his petition for writ of habeas corpus. He further filed a motion for leave to file *in forma pauperis* and for appointment of counsel pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A. His motions for a certificate of probable cause and to file *in forma pauperis* were granted but his motion for appointed counsel was denied. Hamilton proceeded *pro se*, filing a formal notice of appeal on February 5, 1990. Following submission of the initial set of briefs

we appointed counsel to represent Hamilton and both sides filed supplemental briefs.

Analysis

Although Hamilton raises five issues on appeal, we need only address one issue; whether Hamilton received effective assistance of counsel. Hamilton contends that by requiring him to proceed over the timely objection of counsel with a lawyer representing both himself and Fortson, he was automatically denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.

The state argues that the district court properly found that Hamilton had failed to establish an actual conflict of interest and adverse impact on counsel's representation. The state asserts that Hamilton thereby failed to prove ineffective assistance of counsel.[2]

A. *Standard of Review*

In reviewing a petition filed under 28 U.S.C. § 2254, we presume that factual findings made by a state court

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[2] We reject the state's contention that we lack appellate jurisdiction over this case because of Hamilton's failure to file a formal notice of appeal within the thirty days as required by Federal Rule of Appellate Procedure 4(a). Hamilton did file a motion for a certificate of probable cause and a motion to file *in forma pauperis* within the thirty days. We have held that such a filing "substantially complies with the notice of appeal requirements, and therefore, is the equivalent of filing a proper notice of appeal." *Haney v. Mizell Memorial Hosp.*, 744 F.2d 1467, 1472, (11th Cir.1984).

are correct.[3] *See Sumner v. Mata*, 449 U.S. 539, 546, 101 S.Ct. 764, 768, 66 L.Ed.2d 722 (1981). We review factual conclusions made by the district court under the clearly erroneous standard. *See* Fed.R.Civ.P. 52(a); *see also Amadeo v. Zant*, 486 U.S. 214, 223, 108 S.Ct. 1771, 1777, 100 L.Ed.2d 249 (1988). We review mixed questions of fact and law *de novo*. Whether Hamilton received ineffective assistance of counsel or waived any conflict of interest is a mixed question of fact and law with independent review by this court. *See Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-15, 64 L.Ed.2d 333 (1980); *McConico v. Alabama*, 919 F.2d 1543, 1545 (11th Cir.1990); *Oliver v. Wainwright*, 782 F.2d 1521, 1524 (11th Cir.), *cert. denied*, 479 U.S. 914, 107 S.Ct. 313, 93 L.Ed.2d 287 (1986).

B. *Joint Representation*

Hamilton argues that because his counsel timely objected to the joint representation, his right to effective assistance of counsel was violated *per se*. Relying on *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), he argues that he need not show either an actual conflict of interest or any adverse effects

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[3] Section 2254(d) states in pertinent part:
In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State, or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct. . . .

on his counsel's performance from that conflict. Hamilton contends that once he timely objected to joint representation and the trial court failed to explore adequately his objection, his Sixth Amendment right was violated and reversal of his conviction is appropriate.

Relying on *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), the state contends that in order to obtain reversal of his conviction, Hamilton must demonstrate both an actual conflict of interest and that the conflict adversely affected his lawyer's performance. *Id.* at 348, 100 S.Ct. at 1718. The state argues that because Hamilton failed to demonstrate either an actual conflict or adverse impact, he received effective assistance of counsel.[4]

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *See Strickland v.*

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[4] The state's brief on appeal intimates that Hamilton waived his right to conflict-free counsel. We find that such an argument, if intended, would be without merit. A defendant may only waive the right to conflict-free counsel if that waiver is knowing and intelligent. For a waiver "[t]o be knowing and intelligent the defendant must be told (1) that a conflict of interest exists; (2) the consequences to his defense from continuing with conflict-laden counsel; and (3) that he has a right to obtain other counsel." *Duncan v. Alabama*, 881 F.2d 1013, 1017 (11th Cir.1989).

There is no indication from the record that Hamilton was affirmatively informed prior to the first day of trial that there was a conflict of interest, of the consequences therefrom, and of his right to obtain alternate counsel. What is clear from the record is his vigorous objection to joint representation on the first day of trial when the conflict of interest became apparent. We therefore find no waiver of his right to conflict-free representation.

Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984); *Cuyler*, 446 U.S. at 345, 100 S.Ct. at 1716; *Duncan v. Alabama*, 881 F.2d 1013, 1016 (11th Cir. 1989). Part of effective assistance of counsel is the avoidance of conflicts of interest. The Supreme Court has emphasized that when counsel is burdened with a conflict of interest, she "breaches the duty of loyalty, perhaps the most basic of counsel's duties" and has therefore failed to provide effective assistance of counsel. *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067; *see also Buenoano v. Singletary*, 963 F.2d 1433, 1438 (11th Cir., 1992).

In *Strickland*, the Court held that in order to obtain a reversal of a conviction for ineffective assistance of counsel, a defendant must demonstrate both that "counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.* at 687, 104 S.Ct. at 2064. The Court also held, however, that "[i]n certain Sixth Amendment contexts, prejudice is presumed." *Id.* at 692, 104 S.Ct. at 2067. Where there is an issue of conflict of interest, the Court stated, "Prejudice is presumed only if the defendant demonstrates that counsel 'actually represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.' " *Id.* at 692, 104 S.Ct. at 2067 (quoting *Cuyler*, 446 U.S. at 305, 348, 100 S.Ct. at 1718 (footnote omitted)).

Cuyler is limited to those cases in which a defendant raises no objection to joint representation at trial. *Id.* at 348, 100 S.Ct. at 1718; *see also Duncan*, 881 F.2d at 1016 n. 5 ("The opinion in *Cuyler* is specifically limited to cases where the issue was not raised at trial."). The Court

stated that "a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial." *Cuyler*, 446 U.S. at 348, 100 S.Ct. at 1718. It assumed that if a defendant objects to joint representation, a trial court has a constitutional responsibility to determine whether an actual conflict exists. *Id.*

This judicial responsibility was established in *Holloway*. In *Holloway*, the trial court appointed one public defender to represent all three defendants accused of robbing and terrorizing five employees of a restaurant. Prior to trial the public defender asked the court to appoint separate counsel for each defendant because the " 'the [sic] defendants ha[d] stated to him that there is a possibility of a conflict of interest in each of their cases. . . . ' " 435 U.S. at 477, 98 S.Ct. at 1175. After holding a hearing the court refused to appoint separate counsel. All three were found guilty.

In reversing their convictions, the Court refused to resolve whether there was actually a conflict of interest. Instead, it held that the trial court erred by "fail[ing] either to appoint separate counsel or to take adequate steps to ascertain whether the risk was too remote to warrant separate counsel." The Court found this failure to appoint separate counsel or to inquire adequately "deprived [defendants] of the guarantee of 'assistance of counsel.' " *Id.* at 484, 98 S.Ct. at 1179. It determined, therefore, that reversal of defendants' convictions was automatic. *Id.* at 488, 98 S.Ct. at 1180.

Previously we had left open the issue, "whether a defendant must satisfy the *Cuyler* standard to obtain

reversal of his conviction if the trial judge refused to inquire into the *possibility* of conflict after objection." *Duncan*, 881 F.2d at 1017 n. 5 (emphasis added) (citing *Holloway*). We now hold that when defendants make timely objections to joint representation, they need not show an actual conflict of interest when a trial court fails to inquire adequately into the basis of the objection. In such circumstances the trial court has failed to discharge its constitutional duty under *Holloway* to determine whether the defendants are receiving adequate assistance of counsel, a duty separate from the *Cuyler* framework. Reversal, therefore is automatic.

We do not depart from the established precedent of this circuit that in the absence of a timely objection. a defendant must demonstrate that there was an actual conflict of interest that adversely affected her attorney's performance. *See, e.g., Buenoano,* at 1438; *McConico v. Alabama,* 919 F.2d at 1545; *Zamora v. Dugger,* 834 F.2d 956, 960-61 (11th Cir.1987); *Lightbourne v. Dugger,* 829 F.2d 1012, 1023 (11th Cir.1987), *cert. denied,* 488 U.S. 934, 109 S.Ct. 329, 102 L.Ed.2d 346 (1988); *Smith v. White,* 815 F.2d 1401, 1404 (11th Cir.), *cert. denied,* 484 U.S. 863, 108 S.Ct. 181, 98 L.Ed.2d 133 (1987). Rather, we hold that in the situation where there is both a timely objection *and* the trial court fails to appoint separate counsel *or* to inquire adequately into the possibility of a conflict of interest, the reversal will be automatic. *See United States v. Sutton,* 794 F.2d 1415, 1419 (9th Cir.1986) (finding Sixth Amendment violation requiring automatic reversal if "trial judge fails either to appoint separate counsel or to take adequate

steps to ascertain whether the risk is too remote to warrant individual representation"); *United States v. Cirrincione*, 780 F.2d 620, 625 (7th Cir.1985) (no automatic reversal unless a trial court fails to conduct an inquiry after a timely objection); *United States v. Punch*, 722 F.2d 146, 152 (5th Cir.1983) (same).

Applying this legal standard requires that we address two issues: (1) whether counsel's objection on the first day of trial was timely; and (2) if the objection was timely, whether the trial court adequately explored the possibility of conflict of interest.

1. Timeliness

After an examination of the record, we find that the objection was timely. Hamilton's counsel explained his delay:

> My investigation in this matter, your honor, which continued up until ten o'clock last night, convinces me that these defendants should have separate counsel. The court has previously denied our motion to sever and there are matters that will arise in the course of this trial if the men are tried together with the same counsel that will make it impossible for me to adequately defend one without, in the eyes of the jury, seeming to, at least by default admit the guilt of the other.

Record at 9. Counsel's investigation continued until the time of trial because he continued to receive information from the prosecution until the weekend prior to trial. We

find that any delay in counsel's objection to joint representation was caused by the prosecution's delay in providing evidence to the defense and/or the inadequacy of the information provided. Defense counsel received information from the prosecution only after repeated requests and motions.[5] Thus counsel objected to joint representation in as timely a manner as the circumstances allowed.

2. Adequate Inquiry by the Trial Court

We also find that the trial court inadequately inquired into the possibility of a conflict of interest. The court's inquiry consisted solely of commenting in a colloquy during the first day of trial that it doubted that defense counsel wished to elaborate how there was a conflict of interest. Defense counsel did not respond because the comment was made in open court. The court then stated that it had read the trial file in relation to an unrelated motion and did not see how a conflict of interest could arise. No further inquiry was made.

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[5] We further note that counsel was given an incorrect address for Fletcher, the witness who testified at trial that Fortson had told him Hamilton had shot Hynes. Fletcher was not at the address listed because he had been arrested on an unrelated charge. At the October 17 hearing defense counsel discovered that Fletcher was incarcerated but was not told in which jail he was being held. Counsel therefore had no opportunity to interview him prior to his testimony. After Fletcher's testimony, counsel renewed his motion for separate counsel because of the serious nature of the conflict of interest that Fletcher's testimony posed.

We find that the reading of a file for an unrelated purpose is inadequate exploration of the possibility of conflict. Further, by asking defense counsel to disclose trial strategy in open court, the trial court improperly placed counsel in a situation where in order to adequately respond he would have had to disclose client confidences, thereby breaching attorney/client confidentiality. As the Supreme Court stated in *Holloway*, "[O]ur holding [does not] preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest without *improperly* requiring disclosure of the confidential communications of the client." 435 U.S. at 487, 98 S.Ct. at 1179 (emphasis added). We therefore hold that the trial court inadequately investigated the possibility of conflict in this case.

C. *Conclusion*

After review of the record, we conclude that Hamilton timely objected to joint representation because it involved a conflict of interest and that the trial court failed adequately to explore the possibility of conflict of interest as required by *Holloway*. Hamilton's Sixth and Fourteenth Amendment rights of effective assistance of counsel were violated and reversal is automatic.[6]

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[6] Even under the more restrictive *Cuyler* standard, Hamilton would be entitled to a reversal of his conviction because there was an actual conflict of interest that adversely impacted his counsel's performance. If separately represented, Hamilton might have been able to object to Fletcher's testimony as inadmissible hearsay against him. Because Hamilton and Fortson were jointly represented, however, counsel failed to object because it was admissible against Fortson and to do otherwise

We conditionally grant Hamilton's petition for writ of habeas corpus. Accordingly, the writ shall issue unless, within 90 days from the date of this opinion, the state has commenced proceedings to retry the petitioner.

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might have prejudiced Fortson's defense. Counsel also failed to cross-examine Fortson on whether he might have made the statement to Fletcher so as to avoid an intentional murder charge.

In addition, though both defendants utilized an alibi defense, Hamilton, if separately represented, could have exploited Moore's shaky identification of him. At the physical lineup Moore immediately picked Fortson out. Her identification of Hamilton took considerably more time. She initially provided a significantly more detailed description of the robber later identified as Fortson. In describing the robber, later identified as Hamilton, she was only able to describe general features because she had only been able to see the second robber for a brief instance. We therefore find that the *Cuyler* standard has been met in this case.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8023

HENRY HAMILTON,

Petitioner-Appellant,

versus

PAUL FORD, Warden, Jack T. Rutledge Correctional Institute,

Respondent-Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

(Filed Oct. 21, 1991)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion August 21, 11th Cir., 1992, ___ F.2d ___).

Before: BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE